

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN -8 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0173-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ROBERT JOSEPH BENGE,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-56683

Honorable Richard Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Robert Joseph Benge

Buckeye
In Propria Persona

B R A M M E R, Judge.

¶1 A jury found petitioner Robert Joseph Benge guilty of four counts of fraudulent scheme and artifice and three counts of attempted fraudulent scheme and artifice, arising from claims for medical injuries allegedly suffered as a result of slip-and-fall incidents. Benge and his mother staged in various locations in Arizona and other states over a four-year period. The trial court sentenced Benge to concurrent prison terms, the longest of which

was twenty years. We affirmed the convictions, sentences, and restitution order in *State v. Benge*, No. 2 CA-CR 98-0369 (memorandum decision filed Aug. 10, 1999), and denied relief on Benge's petition for review of the trial court's dismissal of his first petition for post-conviction relief in *State v. Benge*, No. 2 CA-CR 01-0045-PR (memorandum decision filed May 22, 2001). In this pro se petition for review of the trial court's summary denial of Benge's second petition for post-conviction relief,¹ filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., Benge claims the trial court abused its discretion by denying relief on his claims of ineffective assistance of trial counsel and newly discovered evidence. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶2 Benge claims the trial court abused its discretion by finding his claims precluded, arguing that his trial attorney, David Darby, had been ineffective for failing, inter alia, to cross-examine an Arkansas detective Benge contends provided perjured testimony at trial; to file a motion for a mental health evaluation under Rule 11, Ariz. R. Crim. P., 16A A.R.S.; and to object at sentencing to the court's finding as an aggravating factor that he had committed the offenses while he was on parole.²

¹Appointed post-conviction counsel notified the trial court she could not find any colorable claim to present and requested that Benge be permitted to file a pro se petition for post-conviction relief, a request the court granted.

²Although it is unclear from the petition for review that the first and third claims are based on ineffective assistance of counsel, because they were plainly raised as ineffective

¶3 Bengé contends that, because his visual disability prevented him from discovering the information about the Arkansas detective earlier, it constitutes newly discovered evidence. We reject his argument for several reasons. First, he did not raise this as a claim of newly discovered evidence in the trial court; therefore, this argument is not properly before this court. Ariz. R. Crim. P. 32.9(c). Second, Bengé has failed to show how his claim qualifies as newly discovered evidence under Rule 32.1(e)(3), nor has he explained how his disability hindered him from discovering the evidence in the eight years since his trial.

¶4 More importantly, because Bengé could have but did not previously raise all of the claims now before us, he is precluded from raising them in a new post-conviction petition. Therefore, the trial court was correct in so finding. *See* Ariz. R. Crim. P. 32.2(a)(2), (3) (“A defendant shall be precluded from relief . . . based upon any ground . . . [f]inally adjudicated on the merits . . . in any previous collateral proceeding . . . [or t]hat has been waived . . . on appeal, or in any previous collateral proceeding.”). In his first petition for post-conviction relief, Bengé argued that trial counsel had been ineffective, albeit for other reasons. Bengé’s claim that trial counsel provided ineffective assistance was finally adjudicated in his first post-conviction proceeding, and he waived any other claims about trial counsel’s effectiveness not raised at that time. *See State v. Conner*, 163 Ariz. 97,

assistance claims in the petition for post-conviction relief, we can infer Bengé intended they be raised as such on review.

99-100, 786 P.2d 948, 950-51 (1990) (claim in first post-conviction petition of ineffective assistance of counsel at sentencing precludes claims of ineffective assistance at trial in a subsequent petition). To the extent Bengé did not intend all of the claims he has raised on review to be characterized as ones of ineffective assistance of trial counsel, such claims are, in any event, precluded because he could have raised them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 We grant the petition for review, but because we find no abuse of discretion in the trial court's denial of the petition for post-conviction relief, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge